SUPREME COURT OF QUEENSLAND

CITATION:	*King's College v Allianz Insurance* [2003] QSC 353
PARTIES:	**KING'S COLLEGE** (applicant) **v** **ALLIANZ INSURANCE AUSTRALIA LTD ACN 000 122 850** (first respondent) **WORKCOVER QUEENSLAND** (second respondent)
FILE NO/S:	SC No 4852 of 2003
DIVISION:	Civil
PROCEEDING:	Application for Declaration
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2003
JUDGE:	Holmes J
ORDER:	**Declaration, terms to be settled**
CATCHWORDS:	PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – DECLARATIONS – JURISDICTION – where applicant sought indemnity from first and second respondents in respect of proceedings brought against it in Anti-Discrimination Commission – where applicant held insurance policies with first respondent – where applicant held WorkCover policy with second respondent – whether questions of fact still to be resolved – whether application premature – whether question of applicability of *WorkCover Queensland Act* to Anti-Discrimination Commission proceedings is one which should be resolved WORKERS' COMPENSATION – INSURANCE OR LEVY – QUEENSLAND – whether *WorkCover Queensland Act* has application to complaint in the Anti-Discrimination Commission *Anti-Discrimination Act* 1991 (Qld) *WorkCover Queensland Act* 1996 (Qld) *American Home Assurance Taylor Holdings Ltd (in liquidation)* (1993) 59 SASR 432 *AMP Fire & General Insurance Company Ltd v Dixon &*

Anor [1982] VR 833
Bass v Permanent Trustee Co Ltd (1998) 198 CLR 334
Lessue & Others v Quetel Pty Ltd, CA No 72 of 1993, 1 November 1993
Reeves–Board v Queensland University of Technology [2002] 2 Qd R 85
Sumner v William Henderson & Sons [1963] 2 All ER 712
Swift Australian Co (Pty) Ltd v South British Insurance Co Ltd [1970] VR 368
Tannous & Another v Mercantile Mutual Insurance Co Ltd & Others [1978] 2 NSWLR 331

COUNSEL: R G Bain QC for the applicant
P V Ambrose SC for the first respondent
K F Holyoak for the second respondent

SOLICITORS: Brian Bartley & Associates for the applicant
Clayton Utz for the first respondent
McInnes Wilson for the second respondent

[1] **HOLMES J**: The applicant seeks a declaration that it is entitled to indemnity in respect of complaints against it in the Anti-Discrimination Commission, and the costs incurred to date, under one or other of two insurance policies (a professional indemnity policy and a public liability policy) issued by the first respondent; or, alternatively, under a WorkCover policy issued by the second respondent pursuant to the *WorkCover Queensland Act* 1996.

The complaints of discrimination

[2] The complainant in the Anti-Discrimination Commission was an employee of the applicant, which runs a university residential college. His complaints, which were accepted by the Anti-Discrimination Commissioner, were of abuse, defamatory graffiti and information posted on the internet, property damage and assault, including sexual assault, at the hands of student residents of the college, which he said the applicant had not taken steps to address; and of victimisation by the applicant in the form of a withdrawal of a job offer after his complaints were made to the Commission. The Commissioner accepted the complaints on the basis that they disclosed "that the complainant was treated unfavourably on the basis of his presumed lawful sexual activity in the areas of work and accommodation". The absence of punctuation tends to confuse, but what seems to be asserted is that by allowing the complainant to be molested, the applicant had, on the basis of his presumed sexual activity, provided a working environment and accommodation which were less favourable to him than those provided to others not given, or not presumed to be given, to such sexual activity. Any notion of vicarious liability was expressly disavowed by the Commissioner.

[3] The property damage claims and a claim for indemnity in respect of a personal injuries action brought by the complainant in the District Court have, respectively, been accepted by the first respondent and the second respondent. The question presently posed is whether the applicant can rely on any of the policies identified for indemnification against costs or any payments it may be liable to make if the complaints accepted in the Anti-Discrimination Commission are made out.

The Anti-Discrimination Act

[4] The *Anti-Discrimination Act* 1991 begins with its objects, set out at some length. They include these statements of intention:

> "6. The Parliament considers that –
>
> (a) everyone should be equal before and under the law and have the right to equal protection and equal benefit of the law without discrimination....
>
> 7. It is, therefore, the intention of the Parliament to make provision, by the special measures enacted by the Act, for the promotion of equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and certain associated objectionable conduct."

The scheme of the Act is to prohibit discrimination on the basis of certain attributes (s 7), presumed or actual, in certain areas of activity, among them work (s15) and the provision of accommodation (s83). Sexual harassment is made the subject of a separate prohibition (s118). Section 129 of the Act makes it an offence to victimize another; that is, to do an act to another's detriment because the latter has, *inter alia*, been involved in a proceeding under the Act.

[5] Chapter 7 of the Act deals with enforcement. It permits a complaint of contravention to be lodged with the Commissioner, who must decide within 28 days whether to accept it. It must be rejected if the Commissioner forms a reasonable opinion that it is frivolous or vexatious, misconceived or lacking in substance. Once the complaint is accepted, the respondent must be notified of its substance, and it must be investigated, a process which may include obtaining information or documents. Division 3 of Part 1 of the Chapter sets up a conciliation process, which the Commissioner must set in train if she believes the complaint is capable of resolution in that way. If the complaint is not resolved by conciliation, the complainant is entitled after the expiration of certain time periods, to have it referred to the Anti-Discrimination Tribunal. If the matter is not otherwise resolved, the Tribunal will proceed to a hearing.

[6] Section 209 (1) sets out the orders the Tribunal may make if the complaint is proved:

> "(1) If the tribunal decides that the respondent contravened the Act, the tribunal may make 1 or more of the following orders–
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> (a) an order requiring the respondent not to commit a further contravention of the Act against the complainant or another person specified in the order;
>
> (b) an order requiring the respondent to pay to the complainant or another person, within a specified period, an amount the tribunal considers appropriate as compensation for loss or damage caused by the contravention;
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> (c) an order requiring the respondent to do specified things to redress loss or damage suffered by the complainant and another person because of the contravention;

(d) an order declaring void all or part of an agreement made in connection with a contravention of this Act, either from the time the agreement was made or subsequently."

Subsection 6 contains this definition:

> "**"damage"**…includes the offence, embarrassment, humiliation, and intimidation suffered by the person."

An order of the tribunal may be enforced by filing a copy of it with the court of competent jurisdiction, when it becomes enforceable as an order of the court.

The issues on this application

[7] The issues raised on the application are: whether it is premature and seeks answers to hypothetical questions; whether, if the questions it raises are properly dealt with as matters of construction, the insurance policies respond to the complainant's claims against the applicant, and whether certain exclusions in the policies apply; whether the damages claims to which the *WorkCover Queensland Act 1996* applies extend beyond damages sought in a court, so as to embrace a claim made by way of complaint under the *Anti-Discrimination Act*; and, conversely, whether damages obtainable under the *Anti-Discrimination Act* are damages as contemplated in the *WorkCover Act*.

The arguments as to prematurity

[8] Both Mr Ambrose, for the first respondent, and Mr Holyoak, for the second respondent, argued that the application was premature. Mr Holyoak's submission was in general terms: whether the complainant's claims fell within the definition of "damages" in the *WorkCover Queensland Act* could not entirely be determined in advance of findings by the Anti-Discrimination Tribunal. It was, he was frank in saying, secondary to his principal submission as to the inapplicability of the *WorkCover Queensland Act* to the claims. Mr Ambrose argued, with perhaps more force and specificity, that whether the policies issued by the first respondent responded to the claims depended on particular findings of fact, yet to be made, on which the applicant's liability to the complainant might be based.

The public liability policy

[9] The public and products liability policy ("the public liability policy") indemnifies the applicant for its "legal liability to pay Compensation" in respect of, *inter alia*, personal injury, property damage or defamation "as a result of an Occurrence … happening in connection with The Insured's Business or Products and/or work performed by or behalf of The Insured." Personal injury is defined in the policy in broad terms including bodily injury, mental anguish, discrimination, humiliation and assault. The business of the insured is said to include

> "All activities of The Insured…including but not limited to:
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> religious organisations encompassing Churches, charitable benevolent and socially useful activities, hospitals, aged care centres (including independent living units, hostels, nursing homes and day care centres), schools, colleges and other educational activities, social welfare (including refuge homes), child care centres, conference centres, landlords, property owners, licensors of property,

> retailers, manufacturers, Assembly Agencies, tenants' co-operatives, joint ventures, and all other activities…now or hereafter involving the Insured."

There is an exclusion to the policy which, relevantly for present purposes, will apply only if the WorkCover policy operates to indemnify the applicant.

[10] It was, Mr Ambrose argued, a question of fact as to whether the injuries suffered by the complainant happened "in connection with the Insured's Business or Work performed…..by the insured". It remained to be established that assaults by college students, assuming them to be made out, occurred in connection with the insured's business; whether they did was a question of fact, not of construction. As to the exclusion, s 34(1) of the *WorkCover Queensland Act* stipulates that injury for the purposes of that Act is "personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury", but in sub-section (5) excepts:

> "psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances–
>
> (a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;
>
> (b) the worker's expectation or perception of reasonable management action being taken against the worker…"

Mr Ambrose submitted that there was a question of fact as to whether the complainant was the applicant's employee. That issue was resolved when Mr Bain on behalf of his client made a concession for all purposes that the complainant was employed by the applicant. But in any case, Mr Ambrose said, the exclusion raised questions of fact as to whether the complainant's employment was a significant contributing factor to any injury, the extent to which he had suffered psychiatric injury, and whether it arose from reasonable management action by the applicant.

The professional indemnity policy

[11] The professional indemnity and malpractice policy ("the indemnity policy"), gives cover against liability arising from "claims … for breach of professional duty arising out of any negligence whether by way of act, error or omission on the part of the Insured, in the conduct of the Insured's profession or business as specified in the Schedule". The "Insured's profession" is defined in terms identical to the inclusive definition of "business" in the public liability policy. There was, Mr Ambrose submitted, an issue as to whether there was, as a matter of fact, any breach of professional duty on the applicant's part.

[12] The policy excludes coverage for liability where the insured is entitled to indemnity under other insurance, so that similar considerations to those under the public liability policy apply in respect of indemnity under the *WorkCover Queensland Act*. There is, in addition, an exclusion for "bodily injury or mental injury to, death of or damage to property of any employees of the Insured, arising out of or in the course of their employment". Whether any injury to the complainant arose in the course of his employment was also, Mr Ambrose said, a question of fact.

[13] Mr Bain QC, for the applicant, sought to overcome the charge of prematurity by reframing the declarations sought against the first respondent in terms of the

application of the policies to the complaints as made by the complainant; so, for example, he sought declarations that those complaints were "claims" of "breach of professional duty" within the meaning of the professional indemnity policy, and that they raised matters arising out of alleged negligence of the applicant within the meaning of the policy. Similarly, declarations were sought that the exclusions in both the professional indemnity and public liability policies had no application to the applicant's claim for indemnity in relation to the complainant's complaints.

[14] Mr Bain submitted that the questions raised by the first and second respondents were purely legal points, which could be determined with utility in advance of the proceedings on the discrimination complaints. The complaints of the complainant were clearly delineated by reference to both the material filed in the Anti-Discrimination Commission and his claim in the District Court proceedings. Since his case was settled and clear, it was possible to say whether his claims fell, generically, within the cover provided by the policies.

Whether the application is premature

[15] Authority is hardly needed for the proposition that the court will not answer hypothetical questions. In *Bass v Permanent Trustee Co Ltd*[1] the majority in the High Court criticized the answering of questions by the Full Court of the Federal Court as to whether the state of New South Wales was bound by the *Trade Practices Act :*

> "At best, the answers do no more than declare that the law dictates a particular result when certain facts in the material or pleadings are established … Since the relevant facts are not identified and the existence of some of them is apparently in dispute, the answers given by the Full Court may be of no use at all to the parties and may even mislead them as to their rights."[2]

It was accepted that in some cases the determination of specific questions in advance of other issues would assist in more efficient resolution, but that was so "only if the questions are capable of final answer and are capable of being answered in accordance with the judicial process."[3]

[16] In *Swift Australian Co (Pty) Ltd v South British Insurance Co Ltd*[4] the Full Court of the Victorian Supreme Court declined to consider a question raised on a special case, in an action in which the plaintiff sought a declaration that the defendant was obliged to indemnify it under an insurance policy. The special case question asked whether, on the proper construction of the policy, the plaintiff was in breach of the policy if it had failed in any of various specified ways to meet its duty of care to its employee. But it was not admitted that the employee sustained injury in the course of his employment or that the plaintiff was liable to pay him damages; so, as the court pointed out, a number of essential facts on which the defendant's liability depended had not been determined. The court adverted to these remarks of Sellers LJ in *Sumner v William Henderson & Sons*[5] as apposite:

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[1] (1998) 198 CLR 334.
[2] at 357.
[3] at 358.
[4] [1970] VR 368.
[5] [1963] 2 All ER 712.

> "It does not seem to us possible or, if possible, appropriate to express a general opinion on the law which might be of no effect or erroneous on a certain view of the facts or which would have to be alternative with regard to a variety of views of the facts."

It concluded that answering the question in the case before it would involve it in advising the parties as to their rights and obligations under a number of different states of fact, which might or might not eventually be found by the tribunal of fact. The special case was not, therefore, an appropriate one for determination.

[17] In *Tannous & Another v Mercantile Mutual Insurance Co Ltd & Others*[6], a declaration of liability to indemnify made on the strength of allegations in the statement of claim were set aside. Reynolds JA, with whom Hutley JA agreed, referred to the futility of framing a declaration by reference to allegations in the statement of claim "having regard to the powers of amendment before or during any trial". Mahoney JA similarly alluded to the inappropriateness of making a declaration where the plaintiffs' liability might be significantly affected by the circumstances as proved against them at the trial.

[18] In *AMP Fire & General Insurance Company Ltd v Dixon & Anor*[7] the Victorian Supreme Court considered a situation similar to the present, in which the defendants sought a declaration as to their entitlement to indemnity from an insurer against which they had issued a third party notice. The insurer successfully appealed against the granting of the declaration, the Full Court regarding the determination of the insurer's liability to the defendants before the latter's liability to the plaintiff was resolved as the determination of a hypothetical question. Whether the indemnity provided by the insurance policy attached in the circumstances of the case depended on the facts found; and the facts proved at trial might differ substantially from those established on the application for declaration. It was only in "most exceptional circumstances" that liability of a third party should be declared before the determination of the liability of the defendant to the plaintiff. It might be feasible to obtain a declaration of liability under an insurance policy where there was a pure question of construction of the policy.

[19] In this jurisdiction, the majority in the Court of Appeal in *Lessue & Others v Quetel Pty Ltd*[8] observed that there was a significant difference between the seeking of a declaration as to an insurer's obligation to indemnify concurrently with the proceedings which will establish the liability of the insured to the plaintiff, as opposed to the seeking of such a declaration in advance of the principal proceedings. That was, they considered, the distinguishing feature between cases such as *American Home Assurance Taylor Holdings Ltd (in liquidation)*[9], in which the court accepted the interest of the plaintiff companies in seeking a declaration as to the liability of the defendant directors' insurers to indemnify them concurrently with the determination of the defendants' liability, and cases such as *Dixon*, in which declaratory relief was refused as hypothetical pending any determination of liability.

[20] Mr Bain's argument for resolution of the indemnity question by reference to the complaints and the policies is not without attraction. To say whether the claims as

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[6] [1978] 2 NSWLR 331.
[7] [1982] VR 833.
[8] CA No 72 of 1993, 1 November 1993.
[9] (1993) 59 SASR 432.

formulated by the complainant fall within either of the policies is quite possible as an abstract exercise, and would have utility for his client to the extent of letting it know where it stood in the event that the complainant's claims are made out as presently articulated. But that is at the heart of the difficulty. The complainant is not bound by the terms of his complaints presently formulated in the commission. It is entirely probable that if he were to proceed in the Anti-Discrimination Tribunal, directions would be given for the filing of points of claim and particulars[10]. Apart from raising questions of credibility, there is nothing to prevent him departing from the particulars as given to date; so it is by no means certain that the existing complaint would represent the basis on which a hearing ultimately proceeded. Nor does it follow, of course, that the case made out in the commission will mirror the complaints as framed.

[21] Indeed, although I think Mr Bain is right in saying that the complainant's case is presently "in terms cast as a duty of care", I do not accept his further point that it can only be cast that way. That is because the issue for the Tribunal must be, not whether the applicant breached a duty owed to the complainant, but whether its treatment of him was, for a prohibited reason, less favourable than that of others in the same position. It seems entirely possible that even were discrimination to be made out against the applicant in the Anti-Discrimination Tribunal, the question relevant to the professional indemnity policy, whether there had been a breach of professional duty, would remain unexplored and unanswered.

[22] It is simply not possible at this point to say, as the application filed seeks, that the first respondent has an existing liability to indemnify the applicant, because whether the applicant is liable to the complainant remains to be seen. The applicant has prudently retreated from seeking a declaration to that effect; but the absence of any capacity to make such a declaration before determination of the applicant's liability to the complainant reinforces the view that the questions asked are irretrievably hypothetical. As to the more specifically framed declarations now sought as against the first respondent, Mr Ambrose is right, in my view, in arguing that the connection between any harm suffered by the complainant and his employment by the applicant, or the conduct of the applicant's business or profession, is likely to depend very much on the evidence as it emerges at a hearing.

[23] Ultimately, the question is one of utility. To make the declarations in the abstract, in advance of the provision of such evidence, which might in the event lead to the opposite conclusion, is not useful.

[24] To refuse the applicant declaratory relief as against the first respondent will not, of course, preclude a later determination of its rights if in fact it becomes liable to the complainant in circumstances which meet either of the relevant policies.

[25] There is, I think some difference between the exercise involved in considering the position of the first respondent and that involving the second respondent. The latter may be undertaken to a large extent as a process of statutory construction. There is utility in doing so, because to do so will at least resolve the applicability of the relevant exclusions to the first respondent's policies, and there is a present and live issue as to whether the current process of complaint is one falling under the *WorkCover Queensland Act*.

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10 *Anti-Discrimination Rule* 1993 s 14(2).

The arguments as to the second respondent's liability

[26] The principal argument of counsel for the second respondent, Mr Holyoak, was that the claim in the Anti-Discrimination Commission was not one for damages within the meaning of the *WorkCover Queensland Act* 1996 as it stood between February 2000 and March 2002, the period over which the acts giving rise to the complaints are alleged to have occurred. His basis for this argument was two-fold: firstly that the definition of damages in s 11(1) of the *WorkCover Queensland Act* was to be construed as meaning damages at common law, and secondly, that the scheme of the Act was not reconcilable with the process of complaint under the *Anti-Discrimination Act*. For these propositions he relied on the explanatory memoranda to the *WorkCover Queensland Bill* 1996 and the *WorkCover Queensland Amendment Bill* 2001; and on the requirements of the *WorkCover Queensland Act*, particularly Chapter 5, which regulates access to damages. In addition, he argued that not all the complainant's claims were for personal injury; and that the remedies provided by s 209 of the *Anti-Discrimination Act* did not amount to damages for personal injuries.

[27] Mr Bain argued that it was open to conclude that the procedural requirements of the *WorkCover Queensland Act*, imposed on plaintiffs in master-servant actions, applied equally to a complainant in the Anti-Discrimination Tribunal. Alternatively, it might be concluded as a matter of construction that while other parts of the *WorkCover Queensland Act* applied to persons pursuing claims in the Tribunal, the limitations imposed by chapter 5 did not, and were confined to actions bought in a court. The probability was that compensatory orders available through the Anti-Discrimination Tribunal were not intended to be included in the Chapter 5 regime. If they had been, some specific reference to that effect might have been expected. In any event such orders were of the nature of damages, were referred to as awards of damages in cases involving appeals from the Tribunal[11], and were enforceable, once filed with a court of competent jurisdiction, as judgments for damages.

Does the WorkCover Act apply to complaints under the Anti-Discrimination Act?

[28] In *Reeves–Board v Queensland University of Technology*[12] Mullins J had to consider whether the *WorkCover Queensland Act* applied to an action for damages for the tort of reprisal created by s 43(1) of the *Whistleblowers Protection Act* 1994. Shortly put, the plaintiff there claimed damages for personal injury in the form of an adjustment disorder said to have been caused by harassment and threats in her workplace as a reprisal for her disclosure of untoward activity. Her Honour concluded that the personal injury alleged fell within the definition in s 34(1), as personal injury said to arise out of employment where the employment was a significant contributing factor, and that the liability of the plaintiff's employer was within s 11(1), so as to render that section applicable to the damages claimed. There was, she said, no provision in the *WorkCover Queensland Act* which indicated any intention to exclude causes of action under the *Whistleblowers Act* from its operation. Consequently, compliance with s 302 of the *WorkCover Queensland Act* in relation to the commencement of the proceeding for damages for personal injury was required. It is to be noted, however, that that case involved an action brought in the District Court; so that the decision does not resolve the issues

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11 e.g. *McIntyre v Tully* [2000] QCA 115

12 [2002] 2 Qd R 85.

as to whether the *WorkCover Queensland Act* provisions which have the effect of indemnifying an employer against liability for damages, extend to cover beyond liability for common law damages; and whether the regime governing claims has any application where proceedings are brought in a statutory tribunal.

Extrinsic material as an aid to construing "damages"

[29] Because the term "damages" as used in the Act may be construed as having different meanings, of lesser or greater embrace, recourse may be had to extrinsic material[13] to resolve its meaning and breadth. That exercise supports the contention that the Act as a whole is concerned with common law damages rather than compensation of the type which might be awarded in the anti-discrimination Tribunal.

[30] The explanatory notes to the *WorkCover Queensland Bill* 1996 are replete with references to "common law claims" and "damages at common law". The general outline to the explanatory notes says that the objectives of the Bill are to be achieved by, *inter alia*, including "a pre-proceedings process for common law". An examination of the explanatory notes yields the following references to common law damages, or to access at common law to damages. (In each case the clause number in the Bill corresponds with the section number given to the clause as enacted.):

- The note to clause 6 (as s 6, later repealed by the *WorkCover Queensland and Other Acts Amendment Act* 2000) refers to protecting employers by "strengthened provisions for contributory negligence in common law damages actions as referenced in Chapter 5";
- The note to clause 9 refers to "accident insurance" that "is used to refer to workers compensation coverage for employers to protect against statutory compensation for their workers and damages action taken by their workers at common law";
- The note to clause 11, which deals with the definition of "damages", refers to the entitlement of a worker injured because of "an employer's breach of the common law or statutory duty of care";
- The notes to clauses 14, 22, 23, 24 and 27, which appear in the division dealing with claimants other than workers refer in each case to giving such persons the same entitlement to compensation as workers; "however, the cover does not provide for payment of common law damages". Clause 14 concerns volunteers, clause 22 and clause 23 persons performing community service, clause 24 students and clause 27 other eligible persons;
- The notes to clauses 41, 42, 43, 201, 206 and 207 refer variously to election between a lump sum and "access to common law" or "common law damages";
- The note to clause 50 says that the clause clarifies that the Bill does not impose any legal liability on an employer under common law; that an employer is not responsible for common law damages under the Bill "but independently through common law"; and requires insurance with WorkCover for common law actions;

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[13] s 14B *Acts Interpretation Act* 1954.

- The note to clause 52 says that the clause specifies an employer's requirement to insure against liability to pay "compensation and common law damages" to a worker injured during the course of employment;

- The notes to clauses 206 and 207, dealing respectively with "certificate" and "non-certificate" injury similarly refer to the choice between "common law access" and a "lump sum";

- The note to clause 211 deals with the availability of statutory lump sum compensation for gratuitous care in lieu of *Griffiths v Kerkemeyer* damages. It specifies that damages for professionally provided care are "still available under common law" and that the statutory compensation is not to be deducted from "common law damages awarded in a common law action".

[31] Mr Holyoak also relied on the explanatory memorandum to the *WorkCover Queensland Amendment Bill* 2001. In its statement of objectives it refers to maintaining "workers' rights to proceed to common law" and, like the memorandum to the 1996 Bill, refers to the choice between common law access and a lump sum.

[32] It is not, I think, possible to regard damages recoverable as a remedy created by statute, in a tribunal also created by statute, as "common law" damages, or as being obtained through "access to common law". It is not necessary to consider whether the compensation which the Tribunal may order under s 209 is properly characterised as "damages"; although it is questionable whether monies paid under a settlement achieved by the conciliation process in the commission could be regarded as damages.[14]

The objects and scheme of the WorkCover Queensland Act

[33] Mr Bain argued against drawing a "negative implication" to the effect that because the *WorkCover Queensland Act* makes no reference to complaints under the anti-discrimination legislation, they must therefore not be encompassed by it. It is certainly the case that the Act does not contain any provision equivalent to s 6(5) of the *Personal Injuries Proceedings Act* 2002, which stipulates that the Act "does not affect the seeking, or the recovery or award, of damages in relation to personal injury" under the *Anti-Discrimination Act*. Nevertheless, it is, I consider, legitimate to look at the purposes of the Act, as discernible in its articulated objects and the scheme it sets up, in order to determine whether a construction which would apply it to complaints of discrimination is consistent with those purposes.

[34] Part 2 of Chapter 1 of the *WorkCover Queensland Act* 1996 contains the Act's objects. According to s 5 (1), the purposes of the workers' compensation scheme are the provision of benefits to workers and others in the event of work-related injury or death, and the encouragement of better health and safety performance on the part of employers. In that scheme, among the things to be provided for work injuries are compensation, regulation of access to damages, and "employers' obligation to be covered against liability for compensation". The intention of the scheme is said to be the maintenance of a balance between, in summary, the provision of proper benefits for injured workers and the ensuring of their fair treatment on the one hand, and, on the other, the protection of employers' interests,

[14] See discussion in *Australian and New Zealand Opportunity Law and Practice* CCH Loose-leaf Service at 89-955.

ensuring that their premiums are kept at a reasonable level, while, at the same time, ensuring that the fund itself remains solvent.

[35] Part 4 of the same Chapter sets out some "basic concepts". Section 9 provides that "accident insurance":

> "is insurance by which an employer is indemnified against all amounts for which the employer may become legally liable, for injury sustained by a worker employed by the employer for–
>
> (a) compensation; and
>
> (b) damages."

Section 11 (1) defines "damages" as:

> "damages for injury sustained by a worker in circumstances creating, independently of this Act, a legal liability in the worker's employer to pay the damages to–
>
> (a) the worker; or
>
> (b) if the injury results in the worker's death – a dependant of the deceased worker."

It was common ground that the complainant was "a worker" for the purposes of the Act, but the second respondent argued that the damages referred to in each of those definitions must be common law damages.

In s 34, another "basic concept", "injury" is explained:

> "An **"injury"** is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to injury."

[36] Chapter 2 of the *WorkCover Queensland Act* imposes obligations on the employer. Section 50 (1) makes an employer legally liable for compensation (that is statutory compensation under the *WorkCover Queensland Act*) for injury sustained by his employees; but sub-section (2) goes on to say that the Act does not impose legal liability for damages for workers' injuries, "though Chapter 5 regulates access to damages". Section 52 requires an employer to insure for its legal liability for damages and compensation, to the extent of accident insurance, against injury sustained by its workers. That liability must be provided for under a WorkCover policy. Chapters 3 and 4 of the Act deal with statutory compensation and injury management.

[37] Of most importance for present purposes is Chapter 5, headed "Access to Damages". It presents, I think, two telling indications against application of the Act to discrimination complaints. The first is that its application would require complainants of work-related discrimination to comply with a regime to which no other complainant under the *Anti-Discrimination Act* is subject. That in itself seems at odds with the egalitarian objectives of the *Anti-Discrimination Act.* Secondly, Chapter 5 clearly contemplates that access to damages will occur within the court system. It has no apparent application to proceedings such as those in the Anti-Discrimination Commission or Tribunal.

[38] Part 1 of Chapter 5 contains some definitions, which do not advance matters greatly for present purposes. Part 2 sets up entitlement conditions. Section 253 prescribes who may seek damages for injuries sustained by a worker: workers, categorised according to whether they have claimed compensation and been assessed, and dependants. "Damages" in this section is to be given the same meaning as in s 11.[15] Essentially, the scheme of Part 2 is that any claimant, apart from a dependent, must have his permanent impairment assessed by WorkCover and obtain a notice of assessment or damages certificate. If this part were to apply to workers seeking redress in the Anti-Discrimination Commission for workplace discrimination, they would constitute a unique class of complainant under the *Anti-Discrimination Act*, in requiring assessment before being permitted to seek damages.

[39] Part 3 (since removed from the Act) imposes a duty on workers to mitigate their damages. It is not impossible to imagine situations in which a complainant of discrimination would have the opportunity to mitigate; but again, this would constitute an obligation solely applicable to complainants of work-based discrimination, as opposed to complainants of discrimination in any other context.

[40] Part 4, in s 276, provides for reduction of "the amount of damages that an employer is legally liable to pay" by the amount of compensation paid by WorkCover. Section 277 permits application for the purpose of establishing the amount of that reduction, to "the court in which the proceeding is brought". That reference creates two difficulties in attempting to fit a complaint of discrimination to the provision: firstly, no court is involved in the determination of such a complaint; and secondly, it raises the question of when the "proceeding" is to be regarded as having been "brought" – on acceptance of the complaint in the Anti-Discrimination Commission, or on its reference to the Tribunal?

[41] Section 278 deals with the situation where a worker has received compensation for an injury and is paid damages in respect of it by an employer or another person, whose liability exists independently of the *WorkCover Queensland Act*. In that case the amount of compensation is the first charge on the damages, and the claim cannot be settled for a sum in the amount that would be a first charge without WorkCover's written consent. If such a settlement is made WorkCover is entitled to indemnity from the payer for the balance.

[42] Mr Holyoak placed some reliance on s 278 (10) which provides:

> "in this section–
>
> **"damages"** includes damages under a legal liability existing independently of this Act, whether or not within the meaning of section 11."

He contended that it showed a recognition that damages under s 11, by contrast, had a restricted meaning, being confined to common law damages. There is, I think, considerable force in that submission. It is not necessary to reach any concluded view on the point, but it may well be that the provision would enable WorkCover to rely on the charge created by s 278 to recover the compensation paid to the complainant from any damages recovered by him by way of settlement or order under the *Anti-Discrimination Act*, notwithstanding that the complaint which gave

[15] *Tanks v WorkCover Queensland* (2001) QCA 103

rise to the damages did not fall within the purview of the *WorkCover Queensland Act*.

[43] Part 5 of the Chapter deals with pre-court procedures. Its object (s 279) is to enable early negotiation and resolution of claims "before the start of court proceedings". Section 280 requires the claimant to give notice, the particulars to be included in which are prescribed in considerable detail, before "starting a proceeding in a court for damages". Again, those references create dilemmas, similar to those already alluded to, in any attempt at application of the part to complaints of discrimination. "Court" is defined in schedule 3 to the Act as meaning "the court having jurisdiction in relation to the amount or matter referred to". There is not, of course, a Court having jurisdiction in relation to a complaint in the Anti-Discrimination Commission or Tribunal. The Supreme Court has an appellate jurisdiction confined to appeals on questions of law and may also be asked to give an opinion on a question of law[16]; but the complaint is received by the Commission and heard by the Tribunal. And again, there is the question of whether "proceedings" in respect of a discrimination complaint start with its acceptance by the Commission or with reference to the Tribunal.

[44] Part 5 creates a regime for provision of information and documents as between WorkCover and the complainant and for attempts at resolution of the claim. Again the need for compliance with this regime would create a unique class of complainant in discrimination matters, and to the extend that the Anti-Discrimination Act provides for investigation of a complaint by obtaining documents and information would involve a double set of requirements, one imposed by WorkCover and the other by the Anti-Discrimination commission. Section 291 enables "the court" to order any party to comply with a provision of chapter 5, and to make any consequential or ancillary orders; once more the inapplicability to Commission and Tribunal proceedings is obvious.

[45] Part 6 of the Chapter provides for compulsory conferences. There would be, it is plain, a degree of replication if a complainant were subject to compulsory conference under the *WorkCover Queensland Act* and to a conciliation process as described by division 3 of Part 1 of Chapter 7 of the *Anti-Discrimination Act.* Section 293 formerly required that any mediator appointed be approved under the *Supreme Court of Queensland Act* 1991, the *District Courts Act* 1967 or the *Magistrates Court Act* 1921 according to the jurisdiction relevant, and after amendment in 2001 enabled the registrar of the relevant court to nominate a mediator. Again it is difficult to see that this has any application to the Commission or Tribunal.

[46] Part 7 deals with when a claimant may start court proceedings. Section 302 requires prior compliance with Parts 2, 5 and 6, and also with s 303 which stipulates compliance with or waiver of the s 280 requirement for a notice of claim. Sections 304 and 305 give the court power to give leave or make declarations as to compliance with s 280 so as to enable the commencement of proceedings. The absence of a court with jurisdiction is again a difficulty in discrimination cases. Division 2 of the part prescribes the way in which the proceeding must be brought in terms of the appropriate defendant, and specifies that WorkCover is entitled to conduct proceedings except where the employer is a self-insurer. Section 307 requires the proceeding to be decided by judge without a jury. Section

[16] *Anti-Discrimination Act* 1991 Ch 7 Pt 3

308 permits proceedings to be brought after the end of the limitation period, if within the limitation period a compliant notice of claim has been given or compliance has been waived or a declaration has been made by the court, or leave given, and if there has been compliance with the pre-requisites to proceeding prescribed by s 302.

[47] Part 8 of the Chapter deals with contributory negligence. Although amended in 2001, both before and after the amendment, s 312 set out matters relevant to whether a finding of contributory negligence should be made. Under the earlier version of the Act, Section 314 required a reduction in damages for each of a range of findings of contributory negligence. It is difficult to imagine how contributory negligence could have any application in the context of a discrimination complaint; and, more importantly, there arises again the objection that it would subject only those who complained of workplace discrimination to such a finding.

[48] Part 9 precludes the court from awarding damages for gratuitous services, not an award of a type commonly made by the Anti-Discrimination Tribunal. Part 10 precludes the award of exemplary damages against WorkCover, but under the pre-2001 version of the Act also set a threshold for awards of future economic loss, and limited interest which might be paid on damages. Part 11 deals with costs, distinguishing between claimants on the basis of whether the worker has a work-related impairment of 20 per cent or less. Again each of those parts would impose a different set of considerations in awarding damages to complainants of work-related discrimination. Part 12 of Chapter 5 deals with the situation where a person entitled to seek damages in a Queensland court recovers damages in a court of another state without regard to the limitations of the *WorkCover Queensland Act*. Again the references to courts make any application to the Anti-Discrimination Commission or Tribunal doubtful.

[49] In summary, Parts 4 to12 of the chapter are premised on Court proceedings, and the chapter has built into it a capacity for recourse to the court to enforce compliance or relieve non-compliance. It is simply not possible to envisage how those provisions might apply to a complaint in the Commission or Tribunal.

[50] Nor, to meet the second of Mr Bain's propositions, that only those parts of the WorkCover Queensland Act which do not limit access to damages apply to complainants under the anti-discrimination legislation, are those parts of Act severable in practical terms. For example, the claimant's entitlement to costs under part 11 of chapter 5 will depend on the level of his assessment of permanent impairment under part 9 of chapter 3. It is not practicable to require a complainant in the commission to meet the requirements of chapter 5, which clearly are designed around a court process; but on the other hand it is not possible to say that the damages with which chapter 5 is concerned are of some more limited class than those of which s 11 speaks. Section 5 of the Act, in identifying its objects and its scheme, speaks of statutory compensation on the one hand and damages on the other; as to the latter, in terms of regulation of access to them. There is no room for a separate class of unregulated proceedings for damages. The purpose of the Act, as evinced in s 5, and the way in which the statute as a whole operates to govern claims for damages, lead me to the conclusion that it could not have been intended to apply to complainants under the *Anti-Discrimination Act*[17].

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17 *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297 at 320-1

[51] The end result is that I conclude that the *WorkCover Queensland Act* has no application to the complainant's accepted complaint in the Anti-Discrimination Commission, whether or not it is eventually referred to the Tribunal for determination. A declaration to that effect has, I think, some utility in resolving at least to some extent the effect of the exclusion clauses in the first respondent's policies. I will leave the settling of the form of that declaration until I have discussed it with counsel; but I would envisage a declaration that any liability for personal injury sustained by the complainant which may be imposed on the applicant by settlement in the Anti-Discrimination Commission or order of the Anti-Discrimination Tribunal is not covered, and does not give rise to any entitlement to indemnity, under any policy issued pursuant to the *WorkCover Queensland Act* 1996.

[52] I will hear the parties as to costs.